

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs

Cr. No. 17-20406-04
HONORABLE PAUL D. BORMAN

VIRDELL KING,

Defendant.

/

**DEFENDANT'S SENTENCING MEMORANDUM,
AND REQUEST FOR DOWNWARD VARIANCE**

On August 29, 2017, Defendant Virdell King pleaded guilty to Count 1 of the Second Superseding Information, "Conspiracy to Violate the Labor Management Relations Act," in violation of 18 U.S.C. § 371, 29 U.S.C. § 186. Ms. King is a retired United Auto Workers employee, having worked for 42 years as a UAW member in various capacities, the last being as a union-side administrator for a management-labor entity known as the "National Training Center." The offense pertains to Ms. King accepting improper personal benefits via a NTC-issued credit card. She is scheduled for sentencing on November 13, 2018 at 10:00 a.m.

The defense disagrees with the Government and the probation department on the scoring of United States Sentencing Guidelines §3B1.3, "abuse of position of trust." The defense also has filed objections to certain information contained in the Presentence Information Report, because it is irrelevant to Ms. King's offense

and her role in a much larger conspiracy.¹ This memorandum addresses the above disagreements and also what level of punishment is appropriate in this case, and includes a request for a downward variance from the guidelines in the event the Court denies Defendant's objection to the scoring of §3B1.3. Counsel also expects the Government to file a motion for downward departure from the Sentencing Guidelines, in consideration of extensive cooperation provided by Ms. King.

In sum, given Ms. King's role in the offense, her lack of any criminal history, her cooperation with the Government, and her general character, and in light of the sentencing factors described in 18 U.S.C §3553(a), counsel asks the Court to impose a sentence that does not involve imprisonment, in whole or in part. Counsel argues that such a sentence will be sufficient, but not greater than necessary, to meet the goals of sentencing. See Gall v. United States, 552 U.S. 38 (2007).

BACKGROUND

Personal. Ms. King is 66 years old (she will turn 67 on February 16). This is her first conviction of any kind, indeed her first adverse contact with the law of any kind save the occasional traffic ticket. When questioned by the UAW's general counsel and other union investigators about her NTC credit card use in March 2016, shortly after she retired, she readily accepted responsibility for receiving improper benefits via that credit card. She did the

¹ The PSIR writer's Addendum to the PSIR says that the defense filed "no objections" to the report. In fact, counsel did file objections by email and regular mail on November 17, 2017, with copies to the Government. See Exhibit A to this Sentencing Memorandum.

same in January 2017, when she first met with Government attorneys and investigators, and has been fully cooperative with law enforcement ever since. Likewise, when ultimately charged in August 2017, she pled guilty to the instant offenses at the first opportunity. She faithfully has honored all pretrial release obligations, and engaged the presentence report investigator fully and forthrightly. This offense notwithstanding, her life is a testament to her character as a person who is law-abiding and who practices respect for the rule of law.

Ms. King was born and raised in Detroit, the child of working class parents. She attended and graduated from public schools, receiving her high school diploma in 1969 from Detroit Northwestern. In September 1973, she was hired at Chrysler's Detroit Axle plant, and she joined the UAW at that time. To this day, she belongs to UAW Local 961.

On June 17, 1978, Ms. King married Larry King, also a UAW worker (for General Motors). Together, they raised two children, Edwina and Laban. Edwina works in Detroit city government, and resides with Ms. King. Laban works in Atlanta for an investment company.

Ms. King and her husband both were active in union governance. In 1987, she became Recording Secretary for Local 961. In 1996, she was elected president of Local 961, the first female president of a Chrysler local. Her husband also was elected president of his local. Together, they were the first wife-and-husband combination in UAW history to serve as presidents of their respective locals.

Instant Case. In 1999, Ms. King was hired out of the Detroit Axle plant by then-UAW Vice President Jack Lakowski to work for the

UAW International Union. She worked at Solidarity House on Jefferson in various capacities involving grievances, education, and orientation of union members. General Holifield became UAW Vice President for Chrysler members in June 2006, and in January 2007 he made Ms. King an "Assistant Director" in his administration. She was assigned to the NTC, which was, and remains, a non-profit entity funded by the company and jointly administered by management and the UAW. The *raison d'etre* of the NTC is to provide education, training, and related benefits to union rank-and-file members.

As AD, she worked out of the "Technical Training Center" division of the NTC in Warren. Her duties included being a liaison on health-and-safety issues, and helping plan and execute events and conferences, including those occurring outside of Detroit. Beginning in 2008, she also served on the "Joint Activities Board," the group that governed the NTC which was comprised of UAW and management (Chrysler Corp. or, later, FCA-Chrysler) members. And finally, she was a member of the negotiating committees for UAW-Chrysler during its contract negotiations with FCA in 2011 and 2015.

Apparently the NTC issued credit cards to company and union officials for many years, but Ms. King did not receive one until late 2012. She did not ask for it. Rather, Vice President Holifield arranged for it and told Ms. King that it would make it easier for her to carry out her job responsibilities, especially those involving planning of events and conferences.

Although Ms. King was part of the UAW-Chrysler's central administration, she did not have significant policy-setting responsibilities, and certainly no authority to set policy. The

structure of the International UAW was, and remains, very hierarchical. The Vice Presidents of each of the "Big-3" unions wield enormous power over their staffs. This includes virtually total discretion over who serves on staff and for how long. Persons like Ms. King are beholden to their superior, and if such a person outlasts her or his welcome that person is demoted or, worse, terminated from the International and, if the person wants to keep the union job, sent back to the plants.

It was within this environment that Ms. King received the NTC credit card. Not long after receiving it, she observed Mr. Holifield using his own NTC credit card to make personal purchases for himself and his significant other. Mr. Holifield encouraged Ms. King to do the same for herself, telling her that such use was approved by FCA management. (FCA paid the credit card bills.) Accordingly, although it seemed wrong to her and she acknowledges that she knew better, over the next three years Ms. King used the NTC credit card to make purchases that personally benefited her, to the tune of between \$10,000-\$15,000 worth of items.

In addition to making personal purchases, Ms. King regularly was asked by superiors, including Mr. Holifield, his successor Norwood Jewell, and Mr. Jewell's administrative assistant Nancy Johnson (a co-defendant in this case), to make improper purchases that personally benefitted them and which totaled at least another \$25,000-\$30,000. Ms. King has taken responsibility for those additional purchases under her plea agreement, again because she knew better. However, while not a legal justification for her actions,

the reality is that, as a subordinate, she was not in position to refuse her superiors' directives without losing her job.

PRESENTENCE REPORT OBJECTIONS (NON-GUIDELINE)

Ms. King's role in the charged conspiracy was much smaller and more contained than that of some of her superiors and persons on the management side of the NTC, including Mr. Holifield and certain other co-defendants in this case. As confirmed in Exhibit A., counsel has objected to references in the PSIR about the larger conspiracy and the obscene amounts of money diverted from legitimate purposes for the personal aggrandizement of those others, because Ms. King not only was not involved in those diversions but she did not even know of them. Specifically, counsel objects to references in PSIR paragraphs 9-11 regarding "\$4.5 million in diverted compensation" and the "Leave the Light on Foundation," and the parallel conspiracy to avoid IRS reporting and tax payments. Counsel asks that such references be stricken.

GUIDELINES OBJECTION

In the Rule 11 Plea Agreement, and in counsel's objections to the PSIR, the defense objected to the scoring of U.S.S.G. §3B1.3 for "Abuse of Position of Trust." Counsel is aware of Application Note 5(B), regarding theft or embezzlement "from a labor union" by a union official in a fiduciary position envisioned by 29 U.S.C. §501(a) and such theft/embezzlement satisfying the guidelines enhancement. However, that statute seems to govern a labor official's dealings with the union's money and property. Here, the offense involves Ms. King improperly benefiting from FCA-Chrysler's money, because it was

FCA-Chrysler that paid the credit card bills. Furthermore, counsel is unaware of any evidence that Ms. King's improper purchases adversely impacted the NTC's operations with respect to providing rank-and-file benefits.

Also, Application Note 1. to this Guidelines section instructs that a "position of trust" requires managerial discretion that is substantial and "ordinarily given considerable deference." This managerial discretion must relate to the theft or embezzlement at issue. Here, Ms. King's obtaining of personal benefits under the credit card did not involve the manipulation of unsupervised managerial discretion. To the contrary, she was supervised closely by persons with absolute authority above her and who encouraged her illegal actions by words and their own similar actions. And, of course, by their regular demands that she do the same on their behalf. She did not conceal her actions or otherwise act to obstruct others from discovery them; to the contrary, when asked she acknowledged them.

The words of the Guideline itself are instructive. They say that it be applied where "the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." (Emphasis supplied.) As described just above, that did not occur here. While counsel has been unable to find a case on point where this Guideline was discussed in connection with a LMRA conspiracy, the plain language of the Guideline signals that it should not apply here.

If the Court upholds counsel's objection and rejects the scoring of U.S.S.G. 3B1.3, Ms. King's total offense level drops from 12 to

10. At that level, she falls within Zone B of the guidelines' Sentencing Table. A guidelines sentence in Zone B includes a sentence of probation, as well as other noncustodial sentences such as home detention.

ARGUMENT REGARDING SEC. 3553(A) FACTORS, AND FOR VARIANCE

The Court is thoroughly familiar with the factors it is to consider in sentencing Ms. King, pursuant to 18 U.S.C. § 3553(a), including the directive that the Court impose a "sentence sufficient, but not greater than necessary" to accomplish the objectives of sentencing. Counsel will briefly address each of the factors relevant to this case, in order.

1. *Nature and Circumstances of the Offense and the Offender.*

As noted, Ms. King is a 66 year old woman before the Court for sentencing on her first criminal conviction. The offense was serious: the LMRA exists to protect an even playing field and fair dealing between management and labor, and a union official who accepts private benefits from management threatens to undermine those important goals. Even where there is not an actual undermining in collective bargaining negotiations, the appearance of a conflict of interest sows doubt about the integrity of the process.

That said, there are significant mitigators in Ms. King's case. First, as noted, she has never been in trouble before, and indeed her life history demonstrates her law-abiding character. Second, this offense was not her idea; the conspiracy was ongoing long before she was given the credit card. Third, she was drawn into the conspiracy and encouraged to accept personal benefits by her superiors, and told that the activity was approved by those paying the bills--Chrysler.

Fourth, her role in the conspiracy and the benefits she personally received were limited compared to those superiors (on both management and labor sides).

Perhaps most important, when investigators (both union and Government) questioned Ms. King about the questionable activities, she was forthright about her involvement and readily accepted responsibility for it. She then fully and extensively cooperated with authorities in their investigation. Counsel expects that this cooperation will be more fully detailed in a motion for downward departure filed by the Government.

It is axiomatic that, when a court hands down a sentence, it does so with a view to the offender as well as the offense. But for this offense, Ms. King has lived a law-abiding life. She has tried to do what she can to bring light to the illegal activity involved here and make it right, and is prepared to make full restitution for her own personal benefit. Counsel believes that all of these circumstances, those attending both the offense and the offender, militate in favor of a non-custodial sentence.

2. *"Just punishment" that promotes respect for the law.*

As recognized by Gall, supra, 552 U.S. at 48-49, any substantial restriction of freedom, even probation, constitutes "punishment" when considering what form of punishment is appropriate in a given case. In this case, a felony conviction, combined with a non-custodial sentence, constitutes consequence and punishment that is sufficient, fair, just, and one that affirms respect for the law. This is especially so when viewed against the backdrop of Ms. King's cooperation, which likewise affirms respect for the law.

3. *Afford deterrence/protect the public.*

"Deterrence" is a concept usually applied to the anticipated impact of a sentence on others who might contemplate similar criminal activity. It is commonly observed that deterrence has more to do with the "certainty" of punishment rather than its "severity." Regardless of the sentence imposed by the Court, it seems likely that a similarly situated first-offender knowing of this case would find sufficient deterrent effect simply by Ms. King's ordeal and its felony outcome. The probation department seems to agree: "any sentence imposed herein might deter this individual and other similarly situated individuals from engaging in fraudulent conduct." (PSIR, par. 73.)

"Protection of the public" usually refers to the impact of sentence on the defendant, and future recidivism. Given her age and history, Ms. King is not a recidivism risk. Again, the probation department seems to agree, noting that "there does not appear to be a need for the Court to consider protection of the public when fashioning a sentence." (PSIR, par. 74.)

4. *Provide needed educational/vocational training, health care.*

This factor does not seem pertinent to Ms. King, who is retired.

5. *The kinds of sentences available.*

In this case, available sentences under the governing statutes include probation, a split sentence (community confinement and/or home detention, or a combination of imprisonment plus community confinement/home detention), or traditional incarceration for up to the statutory maximum term.

If the Court rejects counsel's objection to the scoring of §3B1.3, an alternative to imprisonment would require a variance or downward departure from the guidelines, but such a sentence is no less "available" for that reason. Therefore, a non-custodial sentence as an alternative to imprisonment is an available sentence. If the Court upholds Counsel's objection to the scoring of that guideline, a noncustodial sentence is authorized without a variance, under the guidelines for Zone B scoring outcomes.

6. Avoid unwarranted sentencing disparities.

Counsel is unaware of any case whose outcome would represent an "unwarranted sentencing disparity" should Ms. King receive a non-custodial sentence. Persons sentenced by this Court in related cases received sentences of imprisonment, but either their guidelines were significantly higher, they did not provide cooperation resulting in a Government motion for downward departure, their acceptance of responsibility was delayed or materially incomplete, or all three.

CONCLUSION

Virdell King stands convicted of a serious felony, but it is her only conviction in 66-plus years. She has been a wonderful mother, a hardworking employee, faithful to her friends and family. The offense notwithstanding, her life largely has been devoted to the UAW, her family, and her church. Her remorse is undeniable, and at times she has been literally sick over this conspiracy and her role in it. Her commitment to doing what she can to make right the impacts of the charged conspiracy also has been clearly demonstrated by her cooperation with investigators.

Society does not need to see Ms. King incarcerated when other alternatives are available. A non-custodial sentence would be reasonable and consistent with a sentence that is "sufficient but not greater than necessary" in this case.

Respectfully submitted

Dated: October 30, 2018

s/John A. Shea
John A. Shea (P37634)
Attorney for Defendant
120 N. Fourth Avenue
Ann Arbor, Michigan 48104
(734) 995-4646
jashea@earthlink.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 30, 2018, he electronically filed this Sentencing Memorandum. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: October 30, 2018

s/John A. Shea
John A. Shea (P37634)
Attorney for Defendant
120 N. Fourth Avenue
Ann Arbor, Michigan 48104
(734) 995-4646
jashea@earthlink.net